

Docket: 2005-1048(GST)I

BETWEEN:

MOHAMMAD ZACHARIYA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on December 13 and 15, 2005,
at Vancouver, British Columbia

Before: The Honourable Justice D.W. Beaubier

Appearances:

Agent for the Appellant: Fariyad Ali

Counsel for the Respondent: Gavin Laird

JUDGMENT

The appeal from the assessment made under the *Excise Tax Act*, notice of which is dated November 18, 2003 and bears number 11GU0000329, is dismissed in accordance with the attached Reasons for Judgment.

The appeal of the penalties is also dismissed in accordance with the attached Reasons for Judgment.

Signed at Saskatoon, Saskatchewan, this 28th day of December 2005.

“D.W. Beaubier”

Beaubier, J.

Citation:2005TCC815
Date: 20051228
Docket: 2005-1048(GST)I

BETWEEN:

MOHAMMAD ZACHARIYA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Beaubier, J.

[1] This appeal pursuant to the Informal Procedure was heard at Vancouver, British Columbia on December 13 and 15, 2005. The Appellant testified and called his former accountant, Thobias Emmanuel. The Respondent called Robert Light who at the material times was employed by Bee-Clean Building Maintenance Incorporated (“Bee-Clean”) in the metropolitan Vancouver area to solicit business for it.

[2] The matters in dispute are set out in paragraphs 2 to 15 inclusive of the Reply to the Notice of Appeal. They read:

2. In computing income for the 1996, 1997, 1998, 1999, 2000 and 2001 taxation years, the Appellant declared the following amounts of business income on his income tax returns, as follows:

<u>Taxation Year</u>	<u>Gross Business Income</u>
1996	\$37,800
1997	\$82,596

1998	\$86,359
1999	\$141,898
2000	\$156,588
2001	\$191,315

3. The Appellant did not file Goods and Services Tax (“GST”) returns for the years ending December 31, 1996, 1997, 1998, 1999, 2000 and 2001. The Appellant’s GST reporting history is detailed in the attached Schedule “A”.
4. On January 29, 2003, the Appellant applied to be registered under Part IX of the *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended (the “*Act*”), and was assigned Registration number 86124 0950 RT0001.
5. By the Assessment, the Minister of National Revenue (the “Minister”) assessed the Appellant net tax of \$54,977.99, penalty of \$22,314.32 and interest of \$4,672.97, respecting GST returns for the period from January 1, 1999 to December 31, 2001 (the “Assessment Period”), as detailed in the attached Schedule “B”. The penalty amount includes a gross negligence penalty of \$13,744.50 assessed under section 285 of the *Act*.
6. By Notice of Objection dated December 24, 2003, the Appellant objected to the Assessment.
7. By Notice of Reassessment number 11GU GL0402 1151 8503, dated January 13, 2005, the Minister reassessed the Appellant to decrease net tax to \$50,139.91, penalty to \$20,399.78 and interest to \$4,308.18, respecting GST returns for the Assessment Period, as detailed in the attached Schedule “B”. The penalty amount includes a gross negligence penalty of \$12,534.96 assessed under section 285 of the *Act*.
8. In so reassessing the Appellant, the Minister relied on the following assumptions of fact:
 - a) the Appellant operates a janitorial service business;

- b) all or substantially all of the Appellant's janitorial service business is subcontracted through Bee-Clean Building Maintenance Incorporated ("Bee-Clean");
- c) at all material times, all or substantially all the Appellant's supplies and services were taxable at the rate of 7 percent;
- d) at all material times, the Appellant's business revenue exceeded the \$30,000 small supplier threshold.
- e) the Appellant was therefore required to be registered for the purposes of section 240 of the *Act*, effective February 1, 1997;
- f) at all material times, the Appellant collected or was required to collect GST on its taxable supplies and services provided;
- g) the Appellant reported business income on his 1996, 1997, 1998, 1999, 2000 and 2001 income tax returns, as follows:

<u>Taxation Year</u>	<u>Gross Business Income</u>
1996	\$37,800
1997	\$82,596
1998	\$86,359
1999	\$141,898
2000	\$156,588
2001	\$191,315

- h) the Appellant was registered under the *Act* effective January 1, 1999;
- i) the Appellant was required to file GST returns and make remittances on an annual basis;
- j) the Appellant understated taxable supplies by a total of \$748,165.29 respecting the Assessment Period;

- k) the Appellant understated GST of \$52,371.57 respecting the Assessment Period;
- l) the Appellant was required to remit net tax of \$50,139.91 for the Assessment Period;
- m) the Appellant did not remit any net tax respecting the Assessment Period;
- n) the Appellant did not keep records in such form or containing such information as would enable the determination of the Appellant's liabilities and obligations as required by section 286 of the *Act*; and
- o) the Appellant did not maintain or provide sufficient documentation to substantiate any further ITC's for the Assessment Period.

9. In levying the gross negligence penalties, the Minister relied on the foregoing assumptions of fact and the following assumptions of fact:

- a) the Appellant failed to report GST of \$52,371.57 for the Assessment Period and the net GST was a material understatement;
- b) the Appellant's accountant advised the Appellant that he was required to collect GST on the taxable supplies provided to Bee-Clean;
- c) the Appellant did not collect or remit GST on his taxable supplies to Bee-Clean; and
- d) the Appellant knew or reasonably ought to have known, that he omitted to file GST returns, and he was grossly negligent in not reporting the amounts of GST collected.

B. ISSUES TO BE DECIDED

10. The issue is whether the Minister has properly assessed the Appellant for net GST, penalties and interest respecting the Assessment Period.

C. STATUTORY PROVISIONS RELIED ON

11. He relies on sections 123, 148, 165, 221, 222, 225, 228, 240, 280, 285 and 296 of the *Act* and the *Input Tax Credit Information Regulations* (SOR/91-45) to the *Act* (the “*Regulations*”).

D. GROUNDS RELIED ON AND RELIEF SOUGHT

12. He respectfully submits that the Minister properly assessed the Appellant for net GST under section 228 of the *Act* as the Appellant underreported that amount by \$50,139.91 during the Assessment Period.
13. He submits that the Appellant did not keep records in such form or containing such information as would enable the determination of the Appellant’s liabilities and obligations as required by section 286 of the *Act*.
14. He submits that the Appellant is not entitled to ITCs in excess of the amounts allowed by the Minister during the Assessment Period because the Appellant neither maintained nor provided sufficient documentation to support further ITCs, as required by subsection 169(4) of the *Act* and the *Regulations*.
15. He submits that the Minister correctly levied a penalty under section 285 of the *Act*, on the basis that the Appellant knowingly, or under circumstances amounting to gross negligence in carrying out his duties or obligations imposed by the *Act*, omitted to file his returns with the Minister respecting the Assessment Period.

[3] Only assumption 8 (g) was refuted in paragraph 8. The Respondent filed copies of the Appellant’s 1999 and 2000 (Exhibit R-5) and 1998 and 2002 (Exhibit R-6) income tax returns. In them the Appellant reported approximately one-half of the income he received from Bee-Clean as employment income and the remainder as business income. Bee-Clean was his only source of income. There were no T-4’s issued or enclosed, but the Appellant did have Mr. Light sign a T-2200 form, which the Appellant filled out, for the 1999 and 1998 years (Exhibits R-3 and R-4). Bee-Clean did not make any withholdings from the Appellant’s income.

[4] None of the assumptions in paragraph 9 of the Reply were refuted.

[5] The entire issue in this hearing was one of credibility on important points, each witness testified divergently. However the most disinterested witness was Mr.

Emmanuel and parts of his testimony were confirmed by the Appellant, as a result of which his testimony is accepted as the truth of the matter.

[6] The Appellant operated a cleaning business as a subcontractor for Bee-Clean in a “zone” in metropolitan Vancouver. He cleaned eight or nine Royal Bank branches, one casino and some other business premises. Essentially he hired and supervised several people at times to do the actual cleaning. Bee-Clean supplied him with a van, specialized cleaning equipment, and some specialized cleaning fluids. The Appellant hired and fired workers, bought supplies, supervised the cleaning and corrected problems or mistakes at his own expense. He subcontracted from Bee-Clean at his own expense. He subcontracted at a fixed price from Bee-Clean although Bee-Clean did supply some specialized cleaning fluids and cleaning equipment and the van. The Appellant paid and deducted some expenses on the van and also used his own vehicle in the business.

[7] When the Appellant went to Mr. Emmanuel for his income tax returns, Mr. Emmanuel asked him, in essence, “what about GST?” The Appellant said that he went to Mr. Light who said the Appellant was an employee and signed the T-2200. Mr. Light denies the conversation but he did sign two T-2200s which Mr. Zackariya had filled out. Mr. Emmanuel did Mr. Zackariya’s income tax returns showing large business income and expenses and still had the GST problem on the portion that was business income. Mr. Emmanuel is believed when he testified that Mr. Zackariya then said that he would pay it.

[8] In particular, the Court finds that the Appellant is, and was, not as illiterate or ignorant as he portrayed himself in Court. There are a number of reasons for this:

1. At the pertinent time he was employing a number of people and operating a successful subcontract in bank and casino premises where meticulous and responsible work was required.
2. He knew about GST from his accountant; he knew he was showing business income and expenses and yet he ignored the GST problem. He testified that he thought that the \$30,000 non-GST level was for net income, but Mr. Emmanuel is believed respecting his version of this exchange.
3. His income tax returns show other investments which are somewhat sophisticated.

4. He filed out the T-2200s which are well done for his purposes.
5. The Appellant did not do any withholdings respecting the cleaning staff that he hired and fired.

[9] Using the tests described in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553, the Court finds:

1. Control

The Appellant subcontracted from Bee-Clean at a fixed price plus specialized equipment, supplies and supplied material and staff to clean various business premises during the years in question. Bee-Clean paid him regular monthly amounts and some special fixed amounts. The Appellant hired and fired his employees, cleaned contracted premises and corrected mistakes at his own expense.

2. Tools

Specialized tools were supplied by Bee-Clean. The Appellant supplied his own vehicle and various other equipment. He deducted business expenses and employees' pay, depreciated and claimed expenses for his own vehicle used in the business and paid for other supplies, all as shown in his income tax returns.

3. Risk of Profit or Loss

The Appellant had a chance of profit or loss. He recorded a modest profit from his reported business income (as distinct from his allegation of additional "employment income") in each year in which his income tax returns are exhibited.

4. Integration

The Appellant's business was not integrated into Bee-Clean's. He was a formally contracted subcontractor operating his own business for himself pursuant to his agreement with Bee-Clean.

[10] The appeal of the assessment for GST is dismissed.

[11] The assessment of the penalty under Section 285 of the *Excise Tax Act* as described in paragraphs 14 and 15 of the Reply is also upheld. The Appellant knowingly omitted to file GST returns. He was advised of his GST duties by Mr. Emmanuel from the beginning. He told Mr. Emmanuel that he would pay the GST on the business income he reported. The Court finds that he knew that he did not receive any employment income from Bee-Clean. He would not have reported part of it as business income if it had been employment income. The Appellant was an active participant and instigator respecting his income tax returns. And he knowingly chose not to file or pay GST.

[12] The Respondent has fulfilled the onus on it respecting the assessment of penalties. The appeal of the levy of penalties is dismissed.

Signed at Saskatoon, Saskatchewan, this 28th day of December 2005.

"D.W. Beaubier"

Beaubier, J.

CITATION: 2005TCC815
COURT FILE NO.: 2005-1048(GST)I
STYLE OF CAUSE: Mohammad Zachariya v. The Queen
PLACE OF HEARING: Vancouver, British Columbia
DATE OF HEARING: December 13, 2005
REASONS FOR JUDGEMENT BY: The Honourable Justice D.W. Beaubier
DATE OF JUDGMENT: December 28, 2005

APPEARANCES:

Agent for the Appellant: Fariyad Ali
Counsel for the Respondent: Gavin Laird

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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